

a

MOHD ZAMBURI NORDIN

v.

KETUA POLIS DAERAH SEGAMAT & ORS

b

HIGH COURT MALAYA, MUAR

JEFFREY TAN J

[ORIGINATING SUMMONS NO: 24-534-1999]

4 APRIL 2005

c

ADMINISTRATIVE LAW: *Public servants - Dismissal from police force - Plaintiff dismissed for offence under para. 12 of the Schedule to the Police (Conduct and Discipline)(Junior Police Officers and Constables) Regulations 1970 - Whether charge wrongly framed - Whether adjudicating authority should have consisted of more than one person - Whether adjudicating authority took extraneous factors into consideration*

d

POLICE: *Disciplinary proceedings - Dismissal - Plaintiff dismissed for offence under para. 12 of the Schedule to the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 - Whether charge wrongly framed - Whether adjudicating authority should have consisted of more than one person - Whether adjudicating authority took extraneous factors into consideration*

*e**f*

This was an action by the plaintiff, a lance corporal with the Royal Malaysian Police, seeking declarations that the disciplinary proceedings brought against him and his subsequent dismissal were wrongful, null and void. He also sought reinstatement and damages, in addition to any other orders that the court thought proper. The plaintiff was dismissed due to the disciplinary offence of behaving in a disorderly manner that was prejudicial to discipline or which was likely to bring discredit to the reputation of the police force, as specified in para. 12 of the Schedule to the Police (Conduct and Discipline) (Junior

g

Police Officers and Constables) Regulations 1970. The show cause letter alleged that the plaintiff had tested positive for the presence of morphine in his urine, a fact that the plaintiff did not dispute. The plaintiff, however, contended that the show cause letter was defective because it alleged that the offence was under para. 12, and given that the offence was the presence of morphine in his urine, the charge should have been instead for an offence under para. 8 of the said Schedule. The plaintiff also submitted that the adjudicating authority should have been more than one person instead of just the Assistant Commissioner of Police ('the ACP'), who had acted as judge, jury and prosecutor, and had also taken into consideration extraneous factors in reaching the decision.

i

Held (dismissing the action):

- [1] The relevant regulations do not specify that a charge must be framed in accordance with the alleged facts. In point of fact, the jurisdiction to exercise disciplinary proceedings necessarily incorporates the power to institute proceedings for any offence, so long as the charge is framed in accordance with one or more offences as specified in the Schedule. The plaintiff could not insist that the charge must be framed in accordance with the offence as specified in para. 8. The plaintiff could insist on compliance with procedure, but on the facts, there was no failure in the procedure. The instant charge was framed in accordance with an offence specified in the Schedule. On top of that, the instant charge contained all particulars of the specific accusation against the plaintiff. Quite clearly, the plaintiff was forewarned of the specific allegation and the specific charge. (p 234 c-e)
- [2] It was contended that the charge should be framed under para. 8 but the disciplinary offence specified in para. 8 is not “indulgence in narcotics” or “over-indulgence in narcotics” but “renders himself unfit for duty through over-indulgence in narcotics”. In essence, the disciplinary offence is “renders himself unfit for duty”, and to commit that disciplinary offence, the plaintiff had to have rendered himself unfit for duty. However, it was not alleged in the charge nor was it admitted by the plaintiff that the plaintiff had rendered himself unfit for duty. The charge asserted that the plaintiff was on duty but had morphine in his urine at the material time, and on those asserted facts, there was no case under para. 8. There was, however, a case under para. 12 since the misconduct was of a character that had undermined the effectiveness of the police as a disciplined force and was accordingly prejudicial to the discipline of the police force. (pp 234 f-h & 235 a)
- [3] The plaintiff held the rank of lance corporal and in respect of members of the police force of that rank, the adjudicating authority was every senior police officer of the rank of Assistant Commissioner or above. In short, the ACP alone duly constituted the adjudicating authority. As for the fact that the ACP had signed the show cause letter, it did not provide a ground to say that the ACP was judge, jury and prosecutor. A charge must be communicated and that signature was no more than to authenticate that the notice of the charge was the act of the adjudicating authority. Furthermore, the contention that the ACP had considered extraneous factors

a could not be further from the truth as the adjudicating authority was right in taking into account the policy of the police force with respect to the misuse of drugs by its members. The adjudicating authority, on the facts, had also not shown any bias toward the plaintiff. (p 235 b-g)

b [4] For these reasons, it was this court's finding that there was no reason to fault the disciplinary proceeding. (p 236 b)

Case(s) referred to:

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] MLJ 169 (*refd*)

c *Md Aris Zainal Abidin v. Suruhanjaya Pasukan Polis & Anor* [2003] 6 MLJ 521 (*refd*)

R v. Chief Constable of the British Transport Police, ex p Farmer QBD 30 July 1998 (*refd*)

Ridge v. Baldwin [1964] AC 40 (*refd*)

Legislation referred to:

d Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, regs. 1(2), 2, 3(3), 4(1), 6, Schedule, paras 8, 12

For the plaintiff - Manjit Kaur Nijar; M/s Njia & Nijar

For the defendants - Suzana Atan, A-G's Chambers

e Reported by Suresh Nathan

JUDGMENT

Jeffrey Tan J:

This is an action for the following orders:

- f*
- (1) Deklarasi iaitu segala prosiding tatatertib yang dijalankan oleh defendan terhadap plaintiff adalah salah, batal dan tidak sah (wrongful, null and void);
 - g* (2) Deklarasi bahawa pemecatan plaintiff adalah salah, batal dan tidak sah (wrongful, null and void) di sisi undang-undang dan plaintiff dikembalikan (reinstated) ke jawatan yang disandang oleh beliau sebelum pemecatannya;
 - (3) Deklarasi bahawa plaintiff adalah berhak kepada gaji, elaun dan lain-lain kemudahan yang akan diperolehi jikalau beliau tidak dipecat dan defendan membayarnya kepada plaintiff;
 - h* (4) Suatu siasatan untuk menentukan gaji, emolumen dan faedah-faedah lain yang plaintiff sepatutnya menerima;
 - (5) Gantirugi untuk pemecatan yang salah, batal dan tidak sah (wrongful, null and void)

i

(6) Kos

a

(7) Faedah

(8) Lain-lain perintah yang mahkamah fikirkan perlu dan sesuai

It is agreed that the plaintiff, a Police Lance Corporal who joined the Royal Malaysian Police on 12 October 1980, was dismissed from the police force on 15 October 1998, for the disciplinary offence “behaves in a disorderly manner or in a manner which is prejudicial to discipline or which is likely to bring discredit on the reputation of the Force or the public service” as specified in para. 12 of the Schedule to the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 (hereinafter referred to as the 1970 Regulations).

b

c

The pertinent show cause letter dated 17 September 1998 reads as follows.

Ruj. Kami: SEGAMAT FP: 9/98
Tarikh: 17 September 1998

d

Lans Koperal Mohd Zamburi bin Nordin
(RF/87628)
Balai Polis Segamat
SEGAMAT

e

Melalui:

Ketua Polis Daerah
SEGAMAT

PEMBERITAHU PERTUDUHAN TATATERTIB

f

Adalah dengan ini dimaklumkan bahawa saya ACP Hj. Mohd Nasir bin Ali (G/3732), Timbalan Ketua Cawangan Khas Johor pada menjalankan kuasa-kuasa tatatertib yang telah diwakilkan kepada saya oleh Suruhanjaya Pasukan Polis melalui P.U. (B) 621 bertarikh 19.12.85 dan P.U. (B) 251 (Pindaan) bertarikh 18.5.89 telah memutuskan untuk mengambil tindakan tatatertib terhadap anda dibawah Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai Rendah Polis dan Mata-Mata) 1970 – P.U. (A) 86 bertarikh 28.2.70 dan P.U. (A) Pindaan 56 bertarikh 23.2.84 di atas pertuduhan tatatertib seperti berikut:

g

Bahawa anda seorang Lans Koperal di dalam Pasukan Polis Diraja Malaysia, ketika itu bertugas di Balai Polis Segamat dalam Kontinjen Johor, pada 1.7.1998 laporan ujian air kencing anda telah disahkan ‘Positif’ mengandungi ‘Morphin’ oleh Ahli Kimiahayat, Perkhidmatan Patalogi, Hospital Daerah Segamat iaitu Normawaty bte Mohammad Noor. Perbuatan anda itu telah berkelakuan dengan cara tidak senonoh atau dengan cara memudaratkan tatatertib atau mencemarkan nama baik

h

i

- a** Pasukan atau Perkhidmatan Awam. Oleh yang demikian, anda telah melakukan kesalahan tatatertib dibawah JADUAL (Peraturan 2)(12), Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-Mata) 1970, (Pindaan) 1984 dan boleh dihukum dibawah peraturan yang sama.
- b** 2. Acara Kamar Tatatertib anda ini akan diadakan pada 13.10.1998 jam 9.30 pagi di Pejabat Timbalan Ketua Cawangan Khas Johor.
3. Sebagaimana kehendak Peraturan 2, Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai Rendah Polis dan Mata-mata) 1970 – P.U. (A) 86 bertarikh 28.2.70 dan P.U.(A) Pindaan 56 bertarikh 23.2.84, jika anda didapati bersalah kepada pertuduhan dihadapan, saya berkuasa mengenakan hukuman sehingga ‘buang kerja’ sebagaimana dinyatakan dibawah Jadual (Peraturan 2) Peraturan tersebut.
- c**
4. Sebagaimana kehendak dibawah Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai Rendah Polis dan Mata-mata) 1970 – P.U.(A) 86 bertarikh 28.2.70 dan Pindaan P.U. (A) 56 bertarikh 23.2.84, anda berhak mendapatkan salinan suratan-suratan berhubung dengan pertuduhan tatatertib dan diwakili di dalam Acara Kamar Tatatertib ini oleh seorang Pegawai Polis dengan syarat-syarat yang ditetapkan dibawah Peraturan tersebut.
- d**
5. Jika anda tidak hadir tanpa sebab yang munasabah saya akan teruskan perbicaraan dan membuat keputusan.
- e**
6. Anda dikehendaki mengakui penerimaan surat ini dengan menandatangani diruangan yang disediakan di Lampiran ‘A’.
- f** The aforesaid show cause letter alleged that the plaintiff on 1 July 1998 was tested positive for the presence of morphine in his urine, a fact that Miss Manjit Kaur Nijar for the plaintiff said is not in dispute. And both Miss Manjit and Miss Suzana bte Atan for the defendants confirmed that encl. 40 contains the documentary exhibits. And according to encl. 37, the agreed issues are (i) whether the show cause letter was a proper show cause letter, (ii) whether there had been a breach of regs. 2, 3, 4, or 6 of the 1970 Regulations, (iii)
- g** whether there was (constituted) a proper Adjudicating Authority during the disciplinary process, and, (iv) whether there was bias/likelihood of bias on the part of the Adjudicating Authority.
- h** But when it came to oral submissions, only the following were taken up in argument. Miss Manjit submitted as follows. The show cause letter alleged that the offence was under para. 12 of the Schedule. Given that the offence was the presence of morphine in his urine, the charge should have been for an offence under para. 8 of the Schedule. “For that reason, I say that the show cause letter was bad.” To support her argument, learned counsel referred to
- i** the following 4 passages from an unreported judgment of Low Hop Bing J in *Abdullah bin Borhan v. Ketua Polis Melaka & Anor* (21-14-1997).

I am of the view that the procedural requirement in drafting a charge meant for a criminal trial would apply with equal force to a disciplinary charge such as in the instant case because both of them share the common denominator ie, penal consequences.

a

...

It is trite law that the charge in question must be precisely formulated to include the specific accusation against the plaintiff who has the right to know and must have notice of the very nature of the charge at the first opportunity, so that the plaintiff is forewarned with clarity and certainty the essential elements or ingredients against him in order to ensure that he can be forearmed in his defence for the purpose of directing all the evidence exclusively to the specific charge.

b

c

...

The fundamental liberty enshrined in art. 5(1) expressly provides that no person shall be deprived of his life or personal liberty save in accordance with law.

d

...

Therefore there is no doubt that art. 5(1) requires that strict compliance with procedural law and substantive law must be observed.

Counsel also referred to the judgment of Kamalanathan Ratnam J in *Md Aris bin Zainal Abidin v. Suruhanjaya Pasukan Polis & Anor* [2003] 6 MLJ 521, at 532.

e

Then again if he was able to show such a line of defence, general order 11(3) would have come into play. The Government saw it fit to defend and assist its employees who found themselves in such situations. It is obvious that by failing to prefer a charge under general order 11(2), the applicant had been deprived of the opportunity of addressing the lines of defences open to him under general order 11.

f

In *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1984] 3 All ER 935, the House of Lords held that administrative action is subject to control by judicial review under three heads:

g

- (1) illegality, where the decision-making authority has been guilty of an error of law, eg by purporting to exercise a power it does not possess;
- (2) irrationality, where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision;
- (3) procedural impropriety, where the decision-making authority has failed in its duty to act fairly.

h

i

- a* It is axiomatic that any act or conduct by the first respondent that restricted or appeared to restrict the applicant's ability to present his case in a manner that can best give him an opportunity to exculpate himself, may be held to be a breach of procedural fairness and thereby warranting a judicial review. And whether there has been such a breach can be ascertained by examining the facts such as in this case where the applicant was inhibited from being able to explain if he was suffering from 'serious pecuniary indebtedness'.
- b*

In this context, I draw to mind the salutary warning of the then Supreme Court in *Ghazi bin Mohd Sawi v. Mohd Hanif bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 which said at p. 130 as follows:

- c* In dealing with Ch D of the 1980 General Orders we remind ourselves that we are dealing with General Orders that have legislative effect and we must guard ourselves against adding words into them which were never intended.

- d* In the circumstances, it is plain that the first respondent ought to have proceeded pursuant to general orders 11 and not 26. Finally I can do no better than to refer to the decision of the House of Lords in *Malloch v. Aberdeen Corporation* [1971] 2 All ER 1278 which held that where an employer failed to take the preliminary steps which the law regarded as essential, he had no power to dismiss, and any purported dismissal was a nullity. Applying this rationale to the case before me, the failure of the first respondent to proceed under the right general order was in my view, tantamount to failing to take the preliminary step which the law regards as essential.
- e*

- Learned counsel continued as follows. It is not defined in the 1970 Regulations or in P.U. (B) 621, but the words "adjudicating authority" denotes more than one person. The Assistant Commissioner of Police (ACP) who conducted the disciplinary proceeding had signed the show cause letter. The said ACP was judge, jury and prosecutor. The last paragraph of the notes of the disciplinary proceeding (see encl. 40 p. 16) showed that the said ACP had considered extraneous factors (counsel cited *B. Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] MLJ 169).
- f*

- g* Miss Suzana submitted that it was the prerogative of the defendants to frame the charge. The presence of morphine in the urine brought the offence under para. 12. The charge was framed in accordance with reg. 3. There was an oral inquiry. The plaintiff was given the right to appoint an officer of his choice to represent him. Some offences fall under more than one paragraph of the Schedule. The conduct of the plaintiff brought disrepute to the Royal Malaysian Police. The plaintiff pleaded guilty. Witnesses were called. There was no cross-examination. No extraneous matters were considered.
- h*

- i*

Miss Manjit replied that there was no evidence to support the charge under para. 12, and that the charge should be under para. 8. a

Regulation 1(2) provides that the 1970 Regulations shall apply throughout Malaysia and *inter alia* to all junior police officers and constables recruited in the States of Malaya, while reg. 2 provides that “any officer who is found guilty of a disciplinary offence as specified in the Schedule hereto shall be liable to any of the punishments as specified in the Schedule”. The Schedule to the 1970 Regulations specifies 66 disciplinary offences. In relation to the instant paras. 8 and 12, they read as follows: b

Any junior officer or constable who: c

(8) while on duty or off duty renders himself unfit for duty through over indulgence in intoxicating liquor or narcotics;

(12) behaves in a disorderly manner or in a manner which is prejudicial to discipline or which is likely to bring discredit to the reputation of the Force or the public service; d

shall be guilty of an offence against discipline and shall be liable to any of the following punishments: Dismissal; Reduction in rank; Deferment of increment; Stoppage of increment; Fine not exceeding one month’s pay; Severe reprimand; Reprimand. e

In relation to such other pertinent regulations, reg. 3(1) provides that “a charge shall be framed in accordance with the offence as prescribed in the Schedule” and that “the charge shall describe the offence briefly and identify the officer with the unlawful act or omission charged”, reg. 3(3) provides that “the charge shall be communicated to the officer at least seven clear days before he is required to make his plea thereto”, while reg. 4(1) provides that “the officer who is the subject of a disciplinary charge may at his own request, be supplied with copies of, or given reasonable access to documents connected with the disciplinary charge, except those documents on which privilege would be claimed before a court”. The 1970 Regulations do not stipulate that the charge should contain particulars as to the time and place of the alleged offence. It nevertheless stipulates, “the charge shall describe the offence briefly and identify the officer with the unlawful act or omission charged”, which must read that the charge should contain, so as to give to the officer notice of the matter with which he is charged, all particulars of the time and place of the alleged disciplinary offence. Even in the case of a disciplinary offence, “It is trite that the charge in question must be precisely formulated to include the specific accusation against the plaintiff who has the right to know and must have notice of the very nature of the charge at the first opportunity, so that f
g
h

i

- a* the plaintiff is forewarned with clarity and certainty of the essential elements or ingredients against him in order to ensure that he can be forearmed in his defence for the purpose of directing all the evidence exclusively to the specific charge” (*Abdullah bin Borhan v. Ketua Polis Melaka & Anor* per Low Hop Bing J). “No one, I think, disputes that three features of natural justice stand out – (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges” (*Ridge v. Baldwin* [1964] AC 40, 132 per Lord Hodson).

- c* The latter regulations governed the form of charge against the plaintiff. “A charge shall be framed in accordance with the offence as prescribed in the Schedule”. The regulations do not specify that the charge must be framed in accordance with the alleged facts. In point of fact, the jurisdiction to exercise disciplinary proceedings necessarily incorporates the power to institute proceedings for any offence, so long as the charge is framed in accordance with one and or more offences as specified in the Schedule. The plaintiff could
- d* not insist that the charge must be framed in accordance with the offence as specified in para. 8. The plaintiff could insist on compliance with procedure. But there was no failure in the procedure. The instant charge was framed in accordance with an offence specified in the Schedule. On top of that, the instant charge contained all particulars of the specific accusation against the
- e* plaintiff. Quite clearly, the plaintiff was forewarned of the specific allegation and the specific charge.

- f* The allegation was that the plaintiff on 1 July 1998 had morphine in his urine whilst he was on duty at the Segamat Police Station. The charge was that by such conduct the plaintiff had behaved in a disorderly manner or in a manner which was prejudicial to discipline or which was likely to bring discredit to the reputation of the Force. It was contended that the charge should be framed under para. 8. But with respect, the disciplinary offence specified in para. 8 is not “indulgence in narcotics” or “over indulgence in narcotics” but “renders himself unfit for duty through over indulgence in intoxicating liquor or
- g* narcotics”. In essence, the disciplinary offence is “renders himself unfit for duty”. To commit that disciplinary offence, the plaintiff had to have rendered himself unfit for duty. But it was not alleged in the charge nor was it admitted by the plaintiff, that the plaintiff had rendered himself unfit for duty. The charge asserted that the plaintiff was on duty, but had morphine in his urine
- h* at the material time. And on those asserted facts, there was no case under para. 8. There was however a case under para. 12, as the misconduct was of

i

a
a character that had undermined the effectiveness of the police as a disciplined force and was accordingly prejudicial to the discipline of the Force (see *R v. Chief Constable of the British Transport Police, ex parte Farmer* QBD 30 JULY 1998). There is no basis to say that the charge should be framed under para. 8.

b
c
d
e
f
It was also argued that the adjudicating authority should be more than one person, that the ACP was judge, jury and prosecutor, and that the ACP considered extraneous factors. But there was no merit in those arguments. The plaintiff held the rank of Lance-Corporal, and in respect of members of the force with that rank, the adjudicating authority was “every Senior Police Officer of the rank of Assistant Commissioner or above” (see P.U. (B) 621 dated 19 December 1985 as amended by P.U. (B) 251 dated 18 May 1989). In short, the ACP alone duly constituted the adjudicating authority. As for the fact that the ACP had signed the show cause letter, it was not any ground to say that the ACP was judge, jury and prosecutor. There is no provision for a jury to sit in adjudication with the adjudicating authority, and the ACP was both judge and jury out of necessity. However, the ACP was not prosecutor on account of the fact that he had signed the show cause letter. A charge must be communicated, and the signature of the ACP on the show cause letter was no more than to authenticate that the notice of the charge was the act of the adjudicating authority. As for the contention that the ACP had considered extraneous factors, it could not be further from the truth. The allegation was that the plaintiff on 1 July 1998 had morphine in his urine. The charge was that the plaintiff had behaved in a disorderly manner or in a manner which was prejudicial to discipline or which was likely to bring discredit to the reputation of the force. Quite evidently, both allegation, and charge had to do with the misuse of drugs by the plaintiff and its effect on the discipline of the force. In considering the sentence, the adjudicating authority was only right to take in account the policy of the force with respect to the misuse of drugs by its members.

g
h
i
There was no bias on the part of the adjudicating authority. If at all, the adjudicating authority had leaned in favour of the plaintiff. After the plaintiff had pleaded guilty to the charge and admitted the facts, which was the instant case, the adjudicating authority could there and then have recorded a conviction. But instead of doing so, the adjudicating authority proceeded to call and record the testimony of 4 witnesses, including the chemist, so as to afford an opportunity to the plaintiff to cross-examine those 4 witness – “untuk memberi keterangan lanjut serta memberi peluang kepada B1 untuk soal kembali kepada saksi-saksi”. It was only after the plaintiff had agreed with

a the testimony of those witnesses and then elected not to cross-examine those 4 witnesses, that the adjudicating authority proceeded to record the mitigation. The plaintiff knew all the evidence against him. The adjudicating authority had made doubly sure of that.

b For the reasons given herein, it is the finding that there is no reason to fault the disciplinary proceeding. In the result, this action, not heard earlier at the specific requests of the parties, is hereby dismissed but with no order as to costs.

c

d

e

f

g

h

i